IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Appeal No.88 of 2000

Mohammad Harunfakir Mohmed Ansari — Appellant
Vs.
The State of Maharashtra — Respondent

Mr.D.G.Khamkar for appellant.
Mr.D.R.More, APP for State.

CORAM: B.H.MARLAPALLE, J.

July 3, 2007.

ORAL JUDGMENT :

1. This appeal arises from the order of conviction and sentence passed by the learned Special Judge under the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act" for short) on 31/3/1999 in NDPS Special Case No.503 of 1997. Out of the two accused, accused no.2 came to be acquitted whereas accused no.1 - the appellant came to be convicted for the offence punishable under Section 20(b)(ii) read with Section 8(c) of the NDPS Act and he has been sentenced to undergo R.I. for ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine of Rs.1,00,000/-, he has been directed to undergo S.I. for four months.

2. As per the prosecution story Shri Patil, Sr.P.I. attached to Mahim Police Station received an

information on 9/8/1997 at about 10.30 hrs. that two persons, one by name Mohommad Haroon Ansari, aged about 25 years, 5’ 5" tall, fair complexion, wearing white shirt and brown colour trouser and another person by name Sohel Ahmed Farooki, aged between 30 to 35 years, wearing Mehandi colour pathani dress, 5’ 5" tall having fair complexion were likely to come near Johnson and Johnson Company, Senapati Bapat Marg, Mumbai 400 016 between 1.00 to 1.30 p.m. on that day and accordingly he passed on the said information to PW 4 PI Sanghai who reduced the same in writing in the information book and copies of the said information were taken and sent to the Senior P.I., Mahim Police Station, ACP, Mahim Division and DCP, Zone-IV, Matunga. PW 4 also sent Police Constable Dubey to Anti Narcotic Cell, C.B. C.I.D. office at Azad Maidan to bring the narcotic kit and Police Constable Mohite called two persons to act as panchas. The pre-trap panchanama was drawn at Exhibit 6 at the police station by PW 3. Panchas signed the same and the panchas took the search of police raiding party including the police vehicle bearing no.MH-01-5607 and nothing incriminating was found in the same. The raiding party proceeded towards Devdarshan Building, Moghal Lane, Mahim and

on reaching there the informant came and met PI Sanghai and while the raiding party had kept a watch, at about 1.15 p.m. they saw two persons coming from Mahim Railway station side and near Johnson & Johnson Company. At that stage the informant pointed the person holding biscuit colour gunny bag in his hand as Mohammad Harun and the other person who was having beard as Sohel Ahmed and immediately thereafter the informant left. The raiding party arranged a trap on the two accused persons and they were intercepted. PW 4 Sanghai took the search of accused no.1 and found that he was having a bag / gunny bag type with biscuit colour and having wooden hand and on its both sides red colour with a picture of a rabbit and with writing "Smile it improves your face value". PI Sanghai opened the bag and found that there were two plastic bags with writing "Jaya Durga Garment Centre 24, Chowk Allahabad". Both the plastic bags were opened and they were found to contain rods of black colour and round colour substance about 8" to 9" long and 1" diameter covered with white plastic which was removed. The substance gave a strong smell. The rods along with the packets were weighed and they were found to be 10 Kgs. The small portion of one rod was taken and tested on the drug identification

kit and the result was positive for charas. Two samples each of 24 gms. in small polythene packets were taken and both the sample packets were kept in brown colour packet, sealed and marked as "A-1" and "A-2". The remaining substance was kept in a white plastic bag, kept in a brown colour packet and marked as "A". All the three packets were tagged labels with signature of pancha i.e. PW 1 - Hemant Nijap. The plastic carry bags along with the white plastic which was used to wrap the substance was also packed and sealed in an envelope and marked as "A-3". On the personal search of accused no.1 a sum of Rs.20/- was recovered from his purse with an identity card like packet having the picture of God and some Urdu writing. The same were packed in an envelope and countersigned and sealed and marked "A-4". Whereas in personal search of accused no.2 a sum of Rs.30/- was found from his packet of Pathani dress, a ring having red stone and a bunch of keys were found. All these articles were kept in a paper envelope, sealed and marked as "B". All the recovered articles were taken charge by PW 4 and both the accused were asked to put their signatures or thumb impressions on the labels but they refused. Panchanama was drawn which was signed by the panchas and PW 3 put his signature.

. During the course of investigation the sample packets were forwarded to the Chemical Analyser and CA report at Exhibit 20 was received and it confirmed that the substance seized was charas. Charge-sheet was field on completion of the investigation. The charge was framed at Exhibit 1. The prosecution examined, as noted little earlier, PW 1 Hemant Nijap, PW 2 Harishchandra Gujar H.C. No.15558 attached to Mahim Police Station, PW 3 - Pravin Tejale, PSI, PW 4 Vilas Sanghai, PI. The statements of the accused recorded under Section 313 of Cr.P.C. were at Exhibits 23 and 24 respectively. On appreciation of the evidence as adduced by the prosecution, both oral and documentary, the trial Court held that the prosecution failed to prove the charge of criminal conspiracy by accused no.1 along with wanted accused with the common object to acquire or to possess or to sell 10 Kgs. of charas in contravention of the provisions of the NDPS Act. However, the trial Court held that the prosecution was successful in proving that the accused no.1 was found in possession of 10 Kgs. of charas in contravention of the provisions of the NDPS Act on 9/8/1997 at about 14.30 hrs. in front of Johnson and Johnson Company, Senapati Bapat

Marg, Mahim, Mumbai-16. While sentencing the accused no.1 the trial Court noted that he was in custody with effect from 9/8/1997 continuously and he would be entitled for set off under Section 428 of Cr.P.C. Thus the sentence period of ten years is likely to expire within about a month's time from now.

3. As before the trial Court, the thrust of the arguments in this appeal by accused no.1 is the non-compliance of the requirements of Section 42(2), Section 50 and Section 57 of the NDPS Act. The learned counsel for the appellant further that the prosecution witnesses i.e. PW 2 to PW 4 were the police personnel and, therefore, their testimony was required to be put to strict proof. It was also alleged that PW 1, the panch witness was a professional panch.

4. In his oral depositions, PW 1 stated that he had not acted as a panch earlier and when he went to the police station on 9/8/1997, the police personnel known to him were not there. He was told by the PW 4 Sanghai that he was required to act as a panch and will have to go to the raiding spot. While proceeding to the spot the raiding party met one

person who also came to the spot along with the same and the said person was the informant whose name was not known to PW 1. He described the informant pointing to PW 4 the accused who had come at about 1.15 p.m. on that day in front of the gate of Johnson & Johnson Company and also the name of accused no.1 who was holding the bag as well as the name of accused no.2 who was without bag and they were together. He also described that after the informant left the raiding party, the raiding party laid a trap and after the accused were encircled, PW 4 informed them about their search on the suspicion of contraband articles in their possession. He also offered them the search to be carried out in the present of any Gazetted Officer of their choice and when they declined to have such a choice, he had informed them that he being a gazetted officer a search could be undertaken in his presence to which they agreed and subjected themselves for search. In the search carried out the articles noted above and marked as Article 1 collectively, Article 2 collectively, Article 5 collectively, Article 6C collectively and Article 7 were found. Search panchanama was carried out at the spot, panchas signed the same and PW 1 identified the signature.

In his cross-examination he was given certain suggestions so as to impeach his disclosure in examination-in-chief and he denied all such suggestions.

5. PW 4 stated in his evidence that after the raid was over the accused were taken to the Mahim police station along with the recovered articles and the statement of PW 3 was recorded and the same was registered as FIR (Exhibit 11). A memo was prepared and all the articles were handed over to the Senior P.I., Mahim Police Station to keep in the safe custody. Its office copy was placed before the trial Court at Exhibit 16. Muddemal was entered in the muddemal register (Exhibit 22-A), Station Diary entry was made (Exh.17-A), on 10/8/1997 a Special Report was submitted to DCP Zone IV, Matunga (Exh.18). On 11/8/1997 sample packet was withdrawn from the custody of Sr.P.I. under letter at Exhibit 19 and the samples were sent to the Chemical Analyser through PW 2 along with the forwarding letter in duplicate (Exh.19) He identified the articles 1 to 7 before the Court and stated that those were the articles recovered from accused nos.1 and 2. PW 3 is the complainant and in his depositions he described

the total narration of the incident from the time Shri Patil received the information till the accused were brought back to the Mahim Police Station along with the contraband articles and the report made by him and registered as FIR (Exh.11). He identified the article nos.1 to 7 before the Court. In his cross-examination he admitted that none of the panch was sent to buy the contraband from the accused no.1. He also admitted that the appraisal of right under Section 50 of the NDPS Act was not given to the accused no.1 in writing. He also admitted that his refusal to take such search by accused no.1 was also not recorded in writing. He supported the evidence of PW 1 and PW 4 that the search of the accused was taken by PW 4 Sanghai.

6. Section 42 provides that any entry, search, seizure and arrest without warrant or authorisation by a police officer can be made either on the basis of personal information or on the information given by any person and taken down in writing. Exhibit 21-A was the copy of the information reduced in writing in the information diary and there was also station diary entry to that effect. Section 42(2) provides that where an officer takes down any

information in writing under sub-section (1) or records grounds of his belief under proviso, he shall forthwith send a copy thereof to his immediate official superior. It was argued by the defence that the copy which was sent and received by the superior officer did not bear the time and as such there was non-compliance of Section 42(2) of the NDPS Act. Exhibit 13 was the office copy of the extract of the information that was sent to the Senior PI, Mahim Police Station, DCP Mahim Division and ACP, Zone-IV Matunga. It had the signatures in token of having received the copy by all these officers but the time of receipt was not mentioned. However, outward number was described. The extract indicated that the information was written at about 12.40 hrs. and the trial Court noted that merely because there is no timing mentioned in token of having received the information, it could not be said that no copy was sent to the superiors. As noted earlier the receipt of the information by these superior officers was at Exhibit 13. Section 57 of the NDPS Act states that whenever any person makes any arrest or seizure under this Act, he shall within 48 hours next after such arrest or seizure make a full report to his immediate official superior. As has been stated by PW 3 and PW

4 such a report was submitted to the superior and notwithstanding the said evidence of these two witnesses, it is to be noted that in the case of Sajan Abraham Vs. State of Kerala **[2001 SCC (Cri) 1217]**, it has been held that the compliance of Section 57 is not mandatory and if substantial compliance of the same is made, it would not vitiate the prosecution case. As far as the requirements of Section 50 are concerned, the evidence of PW 1, PW 3 and PW 4 clearly went to show that both the accused were made aware by PW 4 their right to have an option for being searched by any other gazetted officer and after they orally informed PW 4 that they did not want to exercise such a right, it was PW 4 who informed them, he being a gazetted officer they could be searched in his presence and to which they had agreed. It was submitted by the learned counsel for the accused no.1 that the depositions of all these three witnesses point out that no individual intimation in this regard was given to the accused by PW 4. The submissions are fallacious and the oral depositions of all these three witnesses read together indicate that both the accused were informed about the option they had for offering themselves for a search by the raiding party in the presence of any

other gazetted officer. Thus the trial Court was right in holding that the compliance of Section 50 of the NDPS At was also done and the document at Exhibit 6-A proved that the right of appraisal was told to both the accused. Having regards to the reasoning set out by the trial Court on assessment of the evidence of the three main witnesses i.e. PW 1, PW 3 and PW 4 as well as the Chemical Analyser's report, the charge against the accused under Section 8(c) read with Section 20(b)(ii) of the NDPS Act has been duly proved and, therefore, there is no case made out to interfere with the order of conviction.

6A. So far as the requirements of Section 50 of the NDPS Act are concerned, the Constitution Bench in the case of State of Punjab vs. Baldev Singh **[(1999) 6 SCC 172]** has upheld the oral communication also to be valid under the said Section. On the requirements of compliance of Section 42 and Section 57 of the NDPS Act, a three Judge Bench in the case of Sajan Abraham (Supra) has stated as under:-

(a) In construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has

to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an accused, which may lead to accused to escape, then the prosecution case should not be thrown out.

(b) It is true that the communication to the

immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court, that PW 5 has sent copies of FIR and other documents to his superior officer, which is not in dispute. Ext. P-9 shows that the copies of the FIR along with other records regarding the arrest of the appellant and seizure of the contraband articles were sent by PW 5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said to have prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case, it would not vitiate the prosecution case. In the present case, we find PW 5 has sent all the relevant material to his superior officer immediately. Thus we do not find any violation of Section 57 of the Act."

7. So far as the order of sentence is concerned, as noted earlier, sentence of ten years is likely to

expire within about a month's time. This appeal was dismissed in default on 4/11/2003 and it came to be restored on 17/8/2006. Though the accused had no past record of his involvement for an offence under the NDPS Act or under the Indian Penal Code, under Section 20(b)(ii)(C) of the NDPS act, the RI awarded shall not be less than ten years in case of commercial quantity. In the instant case the quantity seized from the possession of the accused no.1 was 10 Kgs. of charas and, therefore, the sentence awarded was the minimum. The fine amount of Rs.1 lakh is also the minimum. However, having regards to the peculiar facts and circumstances of this case, it would be appropriate that the sentence in default of payment of the fine amount deserves to be reduced, more so when it was submitted by the learned counsel for the appellant that he comes from a very poor financial background. He did not have a steady source of income and does not own any property. He is a married man with family responsibilities.

8. In the premises the appeal fails and the order of conviction and sentence dated 31/3/1999 passed by the learned Special Judge under the NDPS Act, Greater

Mumbai in Special Case No.503 of 1997 is hereby confirmed. However, in default of payment of fine of Rs.1 lakh, the appellant shall undergo S.I. for 15 days. Save and except this modification in the default sentence, the appeal stands dismissed.

(B.H.MARL